SUPREME COURT, U. S.

JUN 14 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 196

DONALD DE SIMONE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Donald De Simone, respectfully prays that the Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals, for the Second Circuit, affirming Petitioner's conviction for Conspiracy (18 U.S.C. 371) and embezzling checks from the Chase Manhattan Bank (18 U.S.C. 656 and 2), two counts. De Simone was sentenced to three concurrent five year terms.

Opinion Below

The Court of Appeals, Second Circuit, affirmed the judgments of conviction without opinion and on the 14th of May, 1968 denied a motion for rehearing without opinion, but did stay the mandate of the court.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1). The Court of Appeals, Second Circuit, denied a motion for rehearing on May 14, 1968.

Questions Presented

I—Whether the defendant's rights to a fair trial were violated by the Trial Court's refusal to grant a hearing under Rule 41(e) F.R.Crim.P. where the uncontradicted evidence revealed that property belonging to petitioner was seized from a car in which he had been riding, but which belonged to another?

II—Whether it was error and denial of a fair trial for the Trial Court to even refuse to permit petitioner to conduct a *voir dire* of the arresting officer with respect to his seizure of incriminating evidence?

III—Whether recent rulings of this Court have shifted the emphasis of the "standing" requirements of motions to suppress under the Fourth Amendment and Rule 41(e), F.R.Crim.P., so as to permit anyone against whom unlawfully seized evidence is offered to object?

This raises the subsidiary question of whether the so-called "third person" rule has been relaxed so as to permit "third persons" to suppress evidence which has been unlawfully seized and thus bar its use against them as if they were directly "aggrieved by the lawless actions of the authorities." (*Katz* v. *United States,* 389 U.S. 285).

Constitutional and Statutory Provisions Involved

Appropriate exerpts of Rule 41(e), F.R.Crim.P. and the Fourth and Fifth Amendments are appended to this Petition.

Statement of the Case

Introductory

The indictment charged that defendant-appellant, DeSimone, together with one George Reno and Helen Wharmby conspired together in a plan to defraud certain banks insured by the F.D.I.C. Reno, an employee of the Chase Manhattan Bank in New York City, allegedly embezzled checks totaling about $5,000.00 and then supposedly arranged to cash these checks at various banks using the name of the payee together with contrived or false drivers' licenses to corroborate identity.

Helen Wharmby was apprehended by the F.B.I. in a bank and shortly thereafter, Reno was taken into custody as he plied his job at Chase Manhattan. Reno turned government's evidence and testified against DeSimone at the trial.

Reno was admittedly an accomplice and it seems safe to assume that without his testimony there could not have been a conviction.* Reno himself pleaded guilty to one count and ultimately received a suspended sentence with probation (3a, 5a).** Wharmby did not testify at the trial, and likewise pled guilty to one count, receiving five years, suspended, and five years probation (3a, 4a).

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* No incriminating evidence was adduced against DeSimone, except that which flowed from the accomplice, Reno (Record 309).

** Figures in parentheses refer to the Appendix of Petitioner in the Court below unless otherwise indicated.

The government called several witnesses who worked in various banks who testified that certain checks which Reno admittedly stole had been cashed by a person other than DeSimone at their respective banks by use of presumably false identification, i.e., false drivers' licenses.

Reno himself testified that DeSimone had approached him in a bar and had solicited him into joining Appellant in a scheme whereby Reno would purloin checks from the bank in which he worked and then share in the proceeds thereof after they were cashed at various banks from time to time with the aid of Helen Wharmby who would pose as the payee.

On April 7, 1965, Reno, who had been arrested the night before at the bank where he worked, having been in custody of the F.B.I. continuously thereafter, played the part of a "Trojan horse" and arranged to meet with DeSimone, the Appellant, at 10:00 A.M.

The meeting took place about the time planned. Four F.B.I. agents accompanied Reno and kept him, and then DeSimone, under surveillance. F.B.I. Agent Goss testified that he saw the Appellant with an envelope and that he tried to give it to Reno, who refused it at first. Later they went to a '59 Mercury, driven by a third party, not involved herein, and Goss immediately approached the car, opened the door and saw DeSimone placing the envelope on the front seat of the car. Goss grabbed the envelope, placed DeSimone under arrest and took him into custody. The envelope contained a stolen check and false license, and other incriminating items, such as blank New York drivers' licenses and registrations.

The defendant testified in his own behalf and denied his guilt. Motions to suppress were denied sans hearings, apparently because DeSimone lacked standing.

The Government's Case

The government called several witnesses who testified along similar lines as to the cashing of certain checks by a woman whose picture they identified. This person was apparently the co-defendant Wharmby, whom Reno knew as "Hank".

Dominick Lauria, employed by the First National City Bank in Brooklyn testified that on March 23, 1965, a woman cashed a check using a license (New York drivers' license) as identification. The check was cashed and travellers checks were purchased in return. He identified this woman as that person depicted in Government's exhibit #13 (48a-51a).

Herbert Setlow, employed with Manufacturers-Hanover Trust Company said the travellers checks were cashed on March 23rd 1965 in his bank (52a).

Albert Meuser, employed by Chase Manhattan Bank at 711 Third Avenue testified that on March 29, 1965, a check was cashed at his branch under the same circumstances as Lauria described (53a-54a).

Evelyn Widemark, employed at Bankers Trust Co. testified that on March 26, 1965 the same woman cashed a check under similar circumstances at her branch (55a-56a).

Philip Miller, employed at First National City Bank testified that on April 6, 1965, a woman depicted in Govern-

ment exhibit 13 tried to cash a check, but that he had received a "warning notice" and therefore called the police who arrived and arrested this woman (56a-59a).

Andrew Kilcullen, a detective with the New York City Police testified that it was he who arrested the woman depicted in exhibit 13 whom he identified as Helen Wharmby (59a). The F.B.I. was notified.

Mario Capra, over objection, was permitted to testify that certain checks were stolen from the Chase Manhattan Bank where Reno worked and were later negotiated (15a, 18a 19a, 20a-28a).

Gorge Reno, the co-defendant, was the chief government witness.

Reno stated that he had worked for the Chase Manhattan Bank during the night shift primarily in the pick-up and delivery department. Checks were processed from various of the branch banks and many were laid out on tables (28a, 29a).

He recalled that he met DeSimone, known to him as "Dapper", just before Thanksgiving in 1964, at a bar. There he had a conversation with Appellant who was interested in Reno's work with checks (29a, 30a).

Reno had admitted that he was cooperating with the Government and had turned government's evidence (27a, 28a).

About a month after the first meeting, Reno asserted that he again met the Appellant on a couple of occasions. In March of 1965, Reno declared that he and DeSimone agreed that he would steal checks and that Reno could arrange to

get a woman to cooperate in cashing them. The Appellant allegedly told Reno that identification was no problem (31a).

Reno then acknowledged embezzling several checks which he stated were given to DeSimone and that a girl, called "Hank" was enlisted to aid in cashing them; that she in fact did manage to cash some, the proceeds of which were shared among them (33a, 35a, 36a-40a). "Dapper" said that he obtained drivers' licenses to use for identification at a cost of $50.00 (37a).

Over objection, the witness was permitted to identify government's exhibit 13 as that of "Hank". A little later, about April 6, 1965, he arranged to have DeSimone call him at the bank at midnight and arranged to meet him the next day at 14th Street and Avenue A (42a, 43a).

Four F.B.I. men accompanied him to this location the next day (43a). DeSimone was to bring a replacement check with him. At the corner, Appellant offered him an envelope which he refused to accept, but as soon as he and DeSimone entered a car parked across the street, the F.B.I. men came over and arrested Appellant seizing evidence (42a, 43a).

On cross-examination, Reno admitted that he had been introduced to DeSimone by one "Frank", whose last name was Sikoski (44a). The girl "Hank" at his first encounter with her was accompanied by one "Sonny" (45a).

Reno stated that after speaking to his lawyer, he pleaded guilty to one count, a "misdemeanor" (46a).

Reno further acknowledged that he gave some statements to the F.B.I. which were not the same as other testimony in the grand jury (47a, 48a).

James Goss, agent of the F.B.I., testified that he went to the Chase Manhattan Bank on April 6, 1965 and kept George Reno under observation. Later he arrested Reno at the Bank and recovered a manila envelope containing four checks (59a, 60a, 61a).

Goss said that he remained with Reno that night and the following day journeyed with him to 14th Street and Avenue A, a prearranged meeting location, where they waited with several other agents for DeSimone.

An interval of 15 minutes elapsed during which time Reno waited on the corner. A 1959 Mercury then pulled up driven by a stranger to the case, and a person, later identified as Defendant, DeSimone, got out and engaged Reno in conversation. DeSimone extended a manila envelope toward Reno who gestured refusal of it (62a, 63a).

Reno and DeSimone then advanced toward the Mercury and the former entered the rear while Appellant seated himself in front (63a).

Goss got out of his car, aproached the Mercury, opened the door and placed DeSimone under arrest (63a). DeSimone had put an envelope on the front seat of his car (63a). [Later Goss said the envelope was under the seat] (68a).

The agent said that he opened the envelope.

At this juncture, a voir dire examination was demanded by defense counsel as to the propriety and lawfulness of the search and procedure regarding the seizure. This was denied (64a-67a). Prior to trial, a motion to suppress had

been made before Herlands, J. and this too was denied then without a hearing (65a-67a; 3a).

Over further objection as to lawfulness of the search and seizure, the witness (Goss) said that there were several items, including a check made out to one MacLennon for $506.02; a driver's license made out to MacLennon and a blank driver's license and blank New York State registration cards (68a, 69a).

In addition, an address book was removed from DeSimone's pocket (71a), and a typewriter from the car (100a-102a).

Goss said that after arresting Reno, they learned he was to go to meet DeSimone the next morning with four checks (75a). Goss went there accompanied by agents Mayer, Lonergan, and Thomas (75a). Goss admitted that other than the manila envelope he could see nothing else in DeSimone's hand. Reno gave the agents a signal to move in (79a).

Goss said that prior to the time he seized the manila envelope from the car, he had never seen it and did not know what was in it (80a). He placed DeSimone under arrest as he seized the envelope (80a). Reno had been unknown to Goss previously and never gave information before (81a). Reno was to give the signal only if DeSimone had the checks on him (82a).

The Defense

Donald DeSimone, testifying in his own behalf, stated he was 30 years of age, married with children and had once been convicted in the past of Robbery, third degree (85a, 86a).

Appellant said that he first met Reno in March of 1965 at the Intermission Club where DeSimone's sister was then singing (86a). He was introduced to DeSimone by "Frank", whom Appellant stated he'd known for a long time (87a).

Appellant testified that it was Reno who approached him with a scheme to purloin checks from the bank wherein Reno was employed. At the meeting, a girl named "Hank" was present, accompanied by one "Sonny" (88a).

DeSimone said he then declined to pursue the matter with Reno and walked away, noticing however, that Sonny was beginning to engage him in a conversation about the bank (89a).

DeSimone said he did not again see Reno until April 7, 1965, where he went at the behest of Sonny (90a). Appellant said that he did not want the envelope from Reno and that he ran back to his car, but was grabbed by the neck by persons later identified as F.B.I. agents (93a, 94a).*

F.B.I. agent Goss was recalled and testified that at the time he apprehended DeSimone, he seized a typewriter from the car as well, the ribbon of which was blue (100a-102a). The appellant renewed his motion to suppress (101a). Defendant had denied it was his typewriter (98a).

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* This contradicted Goss' version and affected the issue of the lawfulness of the search and arrest. Notwithstanding this, neither a hearing, nor even a *voir dire* were permitted.

ARGUMENT ON THE LAW

POINT I

Petitioner was severely prejudiced by the introduction of evidence such as a check, driver's license, address book and a typewriter with a blue ribbon, against him at the trial. These items admittedly had been seized without a search or arrest warrant by the F.B.I. Yet, motions to suppress made before and at trial were denied *without a hearing* and the Trial Court would not even allow a *voir dire* of the F.B.I. agent, thus also denying DeSimone a Sixth Amendment right of confrontation.

The case against DeSimone was very thin indeed, since it consisted primarily of the testimony of the accomplice (and co-defendant) Reno, who admittedly had a motive to "color" his testimony as he had pled guilty but *had not yet been sentenced* at the time of the trial (5a).

The jury might well have taken Reno's testimony *"cum grano salis"* therefore, were it not for the highly prejudicial testimony of the F.B.I. agent Goss that he seized certain items, including a check made out to one MacLennon and a driver's license in the same name and address book, from DeSimone on April 7, 1965 while Appellant was inside a car belonging to a third person. In addition, a typewriter with a blue ribbon was seized from the front seat of the car (100a, 101a). DeSimone had denied it was his (98a).

The typewriter was not *ejusdem generis* with the check or cards. As a matter of fact, under any stretch of the imagination, the F.B.I. were not looking to find a typewriter—at most, they were looking for a check.

In *U.S. ex rel. Nickens* v. *Lavallee,* — F.2d —, 2 Cir., decided 3/5/68, docket #31868) this Court held that a search which results in the seizure of a disconnected item (newspaper clippings there) was unlawful and that the evidence should have been suppressed.

In *Marron* v. *United States,* 275 U.S. 192 (1927), cited with approval in *Stanford* v. *Texas,* 379 U.S. 476, 485 (1965) and *Berger* v. *New York,* 388 U.S. 41, 58 (1967), the Supreme Court held that a search aimed at liquor, could not justify the seizure of ledgers. Similarly here, the F.B.I. at most sought a check in an envelope—it was improper to have seized the typewriter, or the address book.

The typewriter was emphasized in summation by the government as strongly indicative of guilt since some exhibits were typed in blue type. Thus it is clear that the seizure of the typewriter was highly prejudicial.

At page 324 of the record, the prosecutor argued, *inter alia:*

> "Now, you look at the typing. This is blue typing. The ribbon on that typewriter was a blue ribbon. And I ask you whether you think there is a substantial possibility or even a very great likelihood that that typewriter with that blue ribbon was used to type up those drivers' licenses and that that typing on those drivers' licenses was done by a person who had them all in his possession when he was arrested that day."

It is impermissible to assume that it was not error, especialy since the government made much of it.

Chapman v. *California,* 368 U.S. 18 (1967).

But moreover, it was grossly prejudicial for the Court to not only deny the Appellant a hearing on a motion to suppress, but to even deny a *voir dire* at the trial. The only thing expressed by Judge Herlands in his decision denying a hearing was the following:

> "The within motions are denied in all respects for the *factual* and legal reasons set forth in the opposing affidavit of Assistant United States Attorney Gerald H. Abrams, sworn to June 13, 1966, and expounded in the Government's memorandum of Law" and "Supplemental Memorandum", both of which memoranda are ordered filed as part of the Clerk's file in this Case. So ordered.
>
> June 15, 1966.
>
> .....
> (signature of Herlands, D.J.)"

First of all it is difficult to understand how the Judge (Herlands) could have based his decision on *"factual"* grounds since *no hearing* on "facts" was held. The government had taken the position that the car in question belonged to a third person. This in itself should have been probed as a factual matter if for no other reason than to determine whether despite that DeSimone had a proprietary interest or any standing.

In *McDonald* v. *United States,* 335 U.S. 451 (1948) the Supreme Court held that evidence seized from McDonald's room was prejudicial to one Washington, even though there was no right of privacy invaded as to Washington.

In addition, however, in *Katz* v. *United States,* 389 U.S. 285, the Supreme Court held that a "proprietary" interest

may not be the controlling factor in any event. It is the protection of people, not places that controls the Fourth Amendment the Court indicated.

> *"For the Fourth Amendment protects people, not places."*
>
> (*Katz* v. *United States, supra,* 2 Cr. L. at 3066 and see, too, footnote 9.)

The F.B.I. certainly had time to get an arrest warrant and a search warrant if they so desired. There was sufficient time. The law requires that this be done, since the fact that in retrospect the search might have been warranted, cannot substitute for the adherence to proper procedure. The Fourth Amendment requires a disinterested magistrate to make the determination as to a lawful search and not an adversary—a police officer.

> *United States* v. *Ventresca,* 380 U.S. 102;
> *Camara* v. *Municipal Court,* 387 U.S. 523.

Certainly, it could not be claimed that the property (the envelope) had been abandoned since there was no evidence of that (*Hester* v. *United States,* 265 U.S. 57; *People* v. *Lopez,* 22 App. Div. 2d 813).

In view of the circumstances herein, where the F.B.I. admittedly would not have arrested DeSimone at all without an alleged signal from Reno, whom they did not know to be reliable, indicates that it was the search which generated the arrest, not vice versa.

Without an arrest or search warrant, the F.B.I. did not have a right to make an arrest altogether under these circumstances. They did not know that DeSimone had com-

mitted a crime; they did not know what was in the manila envelope as Goss testified that Reno did not open it or take it; and they had not seen DeSimone commit a crime in their presence.

But even assuming that there was a right to arrest on the information of Reno, without conceding it, then an arrest warrant should have been obtained because the information had been imparted the night before. Additionally, this could not justify the seizure of the typewriter which no one had reason to believe would be found or could be connected with DeSimone.

Judge Herlands admitted that he based his decision on "factual" reasons in the government's memoranda. How can a determination of fact be made in an adversary proceeding without affording the defendant a chance to present evidence or cross examine witnesses? (See Sixth Amendment.)

Rule 41(b) F.R. Crim. P. would have permitted the issuance of a warrant to obtain the check in question as it was "embezzled".

Rule 41(e) required an evidentiary hearing if an issue of fact existed. Judge Herlands indicated one did exist.

The government argued that the Appellant lacked "standing" to object to the search and seizure. This was because the automobile from which the evidence was seized belonged to someone else. But Appellant was right there! This was not a remote search. How can it be claimed that he is not "aggrieved"? How could he be more aggrieved since it led to his conviction and without this evidence, it seems that DeSimone would not have been arrested. It was not necessary for DeSimone to admit possession of the items (*Jones* v. *United States*, 362 U.S. 257.)

Judge Murphy apparently denied the motion to suppress because Judge Herlands had ruled on it. But in addition, he even foreclosed a *voir dire* which deprived DeSimone on a right of cross examination (Sixth Amendment). In fact Judge Murphy noted (66a):

> "Mr. Lopez: Well, that was the basis of his affidavit. In any case, we requested a hearing and submitted a memorandum of law in connection with that point.
>
> The Court: Aren't you protected. Judge Herlands evidently decided against you.
>
> Mr. Lopez: Yes, he did without a hearing.
>
> The Court: *Then you are home free if he is wrong.*
>
> Mr. Lopez: I realize that. I just wanted to protect the record here."

The court below erred and the judgment should be reversed for a new trial.

POINT II

The narrow construction of "standing" to move to suppress is violative of the Fourth Amendment and should be expanded by this Court.

The Trial Court below had denied a hearing pretrial and at trial, a voir dire was not even permitted to probe the issue of "standing".

Unfortunately, even the Circuit Court did not delve into the ramifications presented and has not rendered a written decision or opinion.

It would seem that since *Katz* v. *United States,* 389 U.S. 285 (December 1967), the emphasis of the Fourth Amendment has shifted from "proprietary interests" to protection of "people". No longer does it appear that the Su-

preme Court is predicating "standing" on a proprietary interest. There can be no doubt but that DeSimone was "prejudiced" by the seizure of the evidence. He is at least entitled to an *opinion* setting forth the *"reasons"* for the affirmance by that Court so that he may pursue a petition for certiorari with knowledge of that Court's view of the "standing" issue. The Court below likewise denied "reasons"—its reference to the government's memorandum of law is certainly indefinite and insufficient.

If there was an unlawful search and seizure as against even a third party, it is submitted that this should entitle Petitioner to a "hearing" under Rule 41(e), F.R. Crim. P. In *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920) the Supreme Court held that unlawfully seized evidence shall not be used "at all", and this means not for any purpose.

In *Granello* v. *United States,* 386 U.S. 1019, there were also issues involving seizure from a third party. Three justices of the Supreme Court thought certiorari should have been granted in that case.

In *People* v. *Martin,* 45 Cal. 2d 755, 290 P. 2d 855 (1955), the California Supreme Court held that if evidence is illegally obtained against anyone, even a "third" party, that evidence should be suppressed. (See *infra.*) The government will otherwise be encouraged to make "exploratory" searches in the hope of finding evidence of crime, knowing that it will only be suppressed as against the immediate victim and not against anyone else. Thus if the government lawlessly invades "A's" home and seizes evidence against "A", "B", "C", "D", "E", etc., it will "benefit because only "A" would have standing to suppress as against the

victims of the unlawful action." (*United States* v. *Granello*, 365 F. 2d 990, decided 8/3/66 slip opinion 2983, 2994, App. 13.)

Moreover, the Second Circuit, in the same opinion, interpreted *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385 (1920), as meaning that irrespective of whether unlawfully seized property has been returned to the owner, the government might nevertheless use the contents thereof or its knowledge obtained therefrom against anyone else in the world except the immediate victim of the illegal action, either via photocopies it had made (Best Evidence Rule) or by subpoenaing the originals.

What this really amounts to is that the Court of Appeals and the District Court in this case have ruled that the government is free to conduct indiscriminate searches and seizures, with or without search warrants, with the assurance that the only persons against whom such evidence and the poisoned fruits thereof can not be used, will be the immediate victims of the lawless action. It has been held by other Circuit Courts that a contrary rule should prevail:

Compare:

Rosencranz v. *United States* (1st Cir. 1964), 334 F. 2d 738 (rehearing);

Hair v. *United States* (D.C. Cir. 1961), 289 F. 2d 894;

Schoeneman v. *United States* (D.C. Cir. 1963), 317 F. 2d 173;

Diaz-Rosendo v. *United States* (9th Cir. 1966) (reversing itself on rehearing), 357 F. 2d 124;

Plazola v. *United States* (9th Cir. 1961), 291 F. 2d 56;

United States v. *Mullen,* 329 F. 2d 295 (5th Cir. 1964);
United States v. *Bozza* (2d Cir. 1966) 365 F. 2d 206.

Where the property seized is *not contraband* as in the case at bar, it appears that a distinction may be made. (Cf. *Anderson* v. *United States,* 318 U.S. 350, 356 (1943); *McDonald* v. *United States, supra; Gouled* v. *United States,* 255 U.S. 289, 312-313; *Amos* v. *United States,* 255 U.S. 313, 316-317; 62 Harv. L. Rev. 1229, 1230-31 (1949); 8 Wigmore Evid. §2184 (3d ed. 1940).

The Supreme Court of California banned illegally seized evidence as against third parties after reconsidering the rule.

See:

People v. *Martin,* 45 Cal. 2d 755, 290 P. 2d 855 (1955).

It would appear that the holdings in cases such as the one at bar have succeeded in turning back the clock and resurrecting the rule condemned by *Weeks* v. *United States,* 232 U.S. 383 (1914) and *Mapp* v. *Ohio,* 367 U.S. 643 (1961). It would seem that so far as the Government is now concerned, the rule of *People* v. *Defore,* 242 N.Y. 13, that evidence, otherwise admissible cannot be excluded solely because it was obtained by an unlawful search and seizure is the third party rule now. It is incredible that an anachronism of this sort should be permitted to effectively thwart and circumvent the Fourth Amendment, *Weeks,* and *Mapp* to a significant degree.

The policy of condemning lawless conduct by the government as a deterrent is now only applied to immediate victims and not to third persons or even to co-conspirators and law clients of a victim.

(See: *Mapp* v. *Ohio, supra; Wong Sun* v. *United States,* 371 U.S. 471; *Elkins* v. *United States,* 364 U.S. 206; *One Plymouth Sedan v. Pennsylvania,* 380 U.S. 693. See, too, *Rea* v. *United States,* 350 U.S. 214 (1956).)

The instant case and cases like it therefore has rendered almost nugatory all the important advances which have been wrought by this tribunal and state courts recently in the field of search and seizure. The entire policy expressed by this Court condemning the lawless action of Federal authorities by mandating that the government could not gain from such lawless action, is now but a hollow echo with little true significance. (*Walder* v. *United States,* 347 U.S. 62, 64-65).

In *McDonald* v. *United States,* 335 U.S. 451 (1948), this Court held that it would not condone the use of evidence obtained by government officials who had broken into a rooming house and had then peered through a transom of one of the rooms to obtain incriminating evidence. In that case, the defendant, McDonald, was present in his rented room with one Washington. The Court held that the evidence was unlawfully obtained as against not only McDonald, but Washington, as well, despite the fact that Washington was not a resident of that particular house or room.*

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* See concurrence of Mr. Justice Rutledge in *McDonald* favoring an absolute ban.

In *McDonald,* the Court explained that it specifically was *not deciding* an important issue of "standing" which is again raised in the instant case and should be decided once and for all. Thus in *McDonald,* 335 U.S. at 456, this Court explained:

> "Even though we assume, *without deciding,* that Washington who was a guest of McDonald had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well . . . [I]n this case . . . the unlawfully seized materials were the basis of evidence used against the co-defendant. If the property had been returned to McDonald it would *not* have been available at the trial." (Emphasis supplied)

In *Jones* v. *United States,* 362 U.S. 257 (1960), the issue of *"standing"* was enlarged beyond the limits of what it had been theretofore by indicating that rule 41(e), F. R. Crim. P. permitted a person accused of a narcotics violation to challenge the lawfullness of a search and seizure without admitting ownership of possession of the items involved. *Jones* clearly demonstrates that this Court is not so much concerned with actual ownership but rather with whether the government has acted in a lawless manner in obtaining the evidence, and whether justice will be subverted by permitting the government to profit from its own wrongdoing.

In this context, the Court decided *Mesarosh* v. *United States,* 352 U.S. 1. In *Mesarosh,* this Court explained (id. at 9, 14):

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial . . . This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the Federal Courts. If it has a duty to perform, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity . . . [T]he untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts . . . The government of a strong and free nation does not need convictions based upon such testimony' "

In *Silverthorne Lumber Co.* v. *United States, supra* and *Wong Sun* v. *United States, supra,* the Court made it very plain that unlawfully seized evidence or evidence obtained in an unconstitutional manner *must "not be used at all."* In addition, the Court asserted that "knowledge gained by the government's own wrong cannot be used by it . . ." (*Silverthorne Lumber Co.* v. *United States,* 251 U.S. at 392: *Wong Sun* v. *United States,* 371 U.S. at 485).

In *Elkins* v. *United States, supra, Rea* v. *United States, supra, Wilson* v. *Schnettler,* 365 U.S. 381 (1961), *One Plymouth Sedan* v. *Penna., supra,* and other cases, the Court condemned the use of illegally obtained evidence by the government in any manner be it by virtue of a so called "silver platter" doctrine or by virtue of the participation of a federal agent in wrongdoing by state officers.

The vital aspects of this case disclose that the entire protection of the Fourth Amendment will be undermined

and rendered almost nugatory unless something by this Court is done to impress the government with the fact that it may not benefit by its own lawless conduct and that indiscriminate searches and seizures may not be conducted nor may evidence based thereon be used for any purpose whatsover, be it against the immediate victim or otherwise. Any contrary rule means that the government may take a calculated risk and seize evidence at will without search warrants with the assurance that it will only be precluded from prosecuting the immediate victim, but will always be able to prosecute everybody else against whom they may find incriminating evidence.

Therefore, if government agents are permitted to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, the deterrent effect of the Fourth Amendment is to that extent nullified.

In *People* v. *Martin, supra,* the California Supreme Court specifically rejected the use of evidence illegally obtained against anyone, including third persons. Thus at 857 of 290 P. 2d, the California court recognized:

> "Thus, the rule of the lower federal courts is based on the theory that the evidence is excluded to provide a remedy for a wrong done to the defendant, and that accordingly, if the defendant has not been wronged he is entitled to no remedy. Connolly v. Medalic, supra, 58 F. 2d 629, 630. In adopting the exclusionary rule, however, this court recognized that it could not be justified on that theory, People v. Cahan, 44 Cal. 2d 434, 443, 282 P. 2d 905, and based its decision on the ground that *'other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have*

> *been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.'* 44 Cal. 2d at page 445, 282 P. 2d at page 911. This result occurs whenever the government is allowed to profit by its own wrong by basing a conviction on illegally obtained evidence, and if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, *its deterrent effect is to that extent nullified.* Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them." (Emphasis ours)

The Supreme Court has clearly recognized that the whole purpose of the exclusionary rule is not to provide redress for past wrongs, but rather to *deter* lawless conduct by government officials. In *Walder* v. *United States,* 347 U.S. 62 at 64-65, this Court succinctly explained:

> "The Government cannot violate the Fourth Amendment * * * and use the fruits of such unlawful conduct to secure a conviction. [Citation.] *Nor can the Government make indirect use of such evidence for its case* [citation], or support a conviction on evidence obtained through leads from the unlawfully obtained evidence. [Citation.] All these methods are outlawed, and convictions obtained by means of them ar invalidated, because they encourage the kind of society that is obnoxious to free men." (Emphasis supplied)

What the Court lately said in *Jones* v. *United States* and *McDonald* v. *United States, supra,* is largely consistent with

the holding of the California court. Indeed, the California Supreme Court based its own decision in *People* v. *Martin, supra,* largely on opinions of this Tribunal, citing especially *McDonald, Jones,* and *Walder* as well as other decisions of this Court.

Silverthorne Lumber Co., supra, Wong Sun, supra, as well as other cases have consistently held that unlawfully obtained evidence shall not only not be used against the victim in a case, but that *it shall not be used at all.* This is meaningful only if properly enforced. If it may be used against everyone in the world except the so-called immediate victim, then there is little protection in the Fourth Amendment.

A recent comment in the Columbia Law Review, 66 Col. L. Rev. 400, 405 (1966) dealing with a case similar to the one at bar quite aptly noted:

> "Recent developments in the treatment of the exclusionary rule, especially its elevation to the constitutional plane in *Mapp* v. *Ohio* and the increasing willingness to rest it upon the fourth amendment alone, *suggest a need to reevaluate the position of the third party.* In 1955, after reconsidering the rule, the California Supreme Court banned the introduction of illegally obtained evidence in trials of third parties. By avoiding the standing question, Judge Dimock was at least able to pinpoint the factors relevant to the reevaluation of the rule. *Hopefully,* the appellate courts and, ultimately, *the Supreme Court will also reach these considerations in reexamining and clarifying the scope of the fourth amendment's exclusionary rule.*" (Emphasis ours)

See, *Bloustein, Privacy As An Aspect Of Human Dignity,* 39 N.Y.U.L. Rev. 962, 973-4 (1964).

This Court alone can purify the "polluted waters" of injustice by clarifying the thrust of the Fourth Amendment in reference to "standing" once and for all. It is incumbent upon this Court, not only in its role as the highest tribunal in the land, but in its supervisory capacity over the federal courts. This is especially so when the Circuit courts themselves are in disagreement on what is to be done.

POINT II-A

There is a sharp conflict of opinion as well as substantial confusion among the Circuit Courts as to what the Court said and meant in *Jones* v. *United States* and *McDonald* v. *United States*. In other words, the question of "standing" as an aggrieved party under Rule 41(e) to object to an unlawful search and seizure remains an enigma.

A perusal of the opinions of several of the Courts of Appeal in various Circuits indicate that there is a substantial disagreement as well as confusion as to what this Court meant in *Jones* v. *United States, supra,* and *McDonald* v. *United States, supra.* It would appear, for example, that the First Circuit and the Court of Appeals for the District of Columbia interpreted *McDonald* and *Jones* as holding that any use of evidence by the government which has been unlawfully obtained in violation of the immediate victim's constitutional rights may be barred from evidence upon a timely motion made by co-conspirators, co-defendants or the like. See, *Schoeneman* v. *United States* (App. D.C. 1963), 317 F. 2d 173; *Hair* v. *United*

States (App. D.C. 1961), 289 F. 2d 894; *Rosencranz* v. *United States*, 334 F. 2d 738 (1st Cir. 1964); *Woods* v. *United States* (App. D.C.), 240 F. 2d 37 (1956) cert. denied 353 U.S. 941 (1957); *Nelson* v. *United States* (App. D.C. 1952), 208 F. 2d 505, 514, cert. denied 346 U.S. 827; *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631 (2 Cir. 1946); *Diaz-Rosendo* v. *United States* (9 Cir. 1966), 357 F. 2d 124; and *Plazola* v. *United States* (9 Cir. 1961), 291 F. 2d 256.

In the *Diaz-Rosendo* case, *supra*, it appears that the Ninth Circuit was considerably troubled over the thrust of the Court's opinion in *Jones* v. *United States* since it was constrained to overrule a three man bench by an en banc hearing. The Ninth Circuit apparently is of the opinion that the *Jones* case means that Rule 41(e) has been expanded but apparently limits such expansion to the situation where a co-defendant is actually present when an unlawful search and seizure is conducted as against the defendant.

Yet, in *Plazola* v. *United States, supra,* only distinguished in *Diaz-Rosendo,* the Ninth Circuit found that "constructive" possession of marijuana in a car other than that in which Plazola was driving was sufficient to warrant the exclusion of the evidence as against Plazola beeause of its interpretation of *Jones* v. *United States.* It is of course possible that *Plazola* could be otherwise interpreted but this is the inescapable explanation which is inferred from *Diaz-Rosendo* v. *United States,* 357 F. 2d at 133.

In the instant case, the Court did not discuss or consider the theory of "*constructive possession*" but apparently contented itself with a decision which rested on the assumption

that DeSimone had no rights to object to the introduction of the evidence against him merely because he was not the immediate victim of the unlawful search and seizure.

The Second Circuit however, apparently overlooked the fact that in *Birrell* defendant had succeeded in obtaining a suppression order and a direction for return of the seized property, not by virtue of a search of his own premises, but on the theory of "constructive possession." See *United States* v. *Birrell* (S.D.N.Y. 1965), 242 F. Supp. 191. This same theory of "constructive" possession had been accepted by the Second Circuit in *United States* v. *Antonelli Fireworks Co., supra.*

New York State for this reason and for the reason of self-survival and self-interest does not permit a conviction on the uncorroborated testimony of an accomplice (Section 399 Code Crim. Pro., N.Y.).

This Court should lay down rules requiring a cautionary instruction where, as here, the testimony is that of a co-defendant accomplice which most forcefully militates in favor of the conviction.

Other than the testimony of Reno and the seizure of the property by the F.B.I., there is no cogent evidence incriminating Petitioner. The charge therefore should have been given as requested in Request to Charge #9.*

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* While a cautionary charge was given, it was insufficient.

POINT III

The use of Reno, an accomplice, as the main evidence against DeSimone required a charge that the jury weigh this evidence like that of the appellant himself. A requested charge to that effect (Request #9) was denied. The Court exacerbated that error by stressing the fact that DeSimone's testimony was to be weighed as an interested witness, but said nothing similar about Reno.

The defense at trial made a specific request that the Court charge with respect to "accomplices" and that such evidence be weighed carefully and with suspicion as coming from a "tainted source" (request #9). *Hanks* v. *United States,* 88 F. 2d 579; *Catrino* v. *United States,* 176 F. 2d 884.

In *McMillen, Jr.* v. *United States,* — F. 2d — (1st Cir. 11/28/67), 3 Crim. L. Bull. No. 10, p. 698, the Court indicated that accomplice testimony should be carefully scrutinized and some instruction thereon was necessary.

In the case at bar, the co-defendant Reno was awaiting sentence. Was this not a motive of interest as, or nearly as strong, as DeSimone's in the case? Had Reno not shaped up as a good witness, it is inferable that he might well have been given jail time, rather than probation. The District Court should so have indicated, rather than permit the jury only to treat DeSimone's testimony with suspicion.

POINT IV

The guilt of defendant DeSimone was not established beyond a reasonable doubt. The testimony of the accomplice and co-conspirator, Reno, was primarily the main evidence of guilt.

The case against DeSimone was very thin (Record 309). No eyewitness other than Reno had any evidence connecting him with the crime. The F.B.I. was told by Reno that he would meet DeSimone at a given location at 10:00 a.m. on April 7, 1965, but even here, it is only Reno's testimony that is cited by the government as justifying F.B.I. action.

The appellant testified for himself and denied all complicity. He said he was doing a favor for a friend, Sonny, when he met Reno with an envelope. This may have been true.

Reno, on the other hand, apparently stole all the checks; had the exclusive opportunity to do so; admittedly shared in the proceeds and then testified against DeSimone against whom only Reno could make a case. It may well be, as Judge Murphy inferentially suggested in a question, that DeSimone was a *"patsy"* (100a).

For this, despite his questionable participation, Reno is let off with a "slap" on the wrists and DeSimone receives 15 years in prison (5-5-5 concurrently). Only about $5000 in checks were involved.

The Court did not permit the defendant to adequately protect his rights. He was not given a hearing on his motion to suppress, not apparently because he was not prejudiced by the evidence, but only because he was said not to have "standing".

The search and seizure were made in his very presence and not at a remote place belonging to another. As has already been pointed out, "people", not "places" are protected by the Fourth Amendment (*Katz* v. *United States, supra*).

Helen Wharby, "Hank", was arrested. She did not testify. Goss, the F.B.I. agent admitted that he waited for a signal from Reno before seeking to search and arrest DeSimone. The evidence taken from him was a *sin qua non* and without it, presumably there would have been an insufficient case. If not, then why did not the F.B.I. obtain an arrest warrant and a search warrant?

Reno was used much the same way that Colson was in the case of *Massiah* v. *United States,* 377 U.S. 201 (1964), wherein Colson, a co-defendant of Massiah, having a transmitter planted on him, engaged him in an incriminating conversation which was overheard by an F.B.I. agent.

Reno had arranged for the meeting and was looking for a "deal" from the authorities. It was in his interest to use DeSimone as a "patsy". This smacks of entrapment.

The search of DeSimone was valid only if there was "probable cause" to search or it was incident to a lawful arrest. The appellant had been denied an evidentiary hearing on the question of the propriety of the search and seizure, but at least at trial, he should have been permitted a "*voir dire*" on that aspect. This too was denied.

The arrest here was based on the most tenuous of grounds. The police (F.B.I.) had no basis to evaluate the reliability of Reno's information and DeSimone was in no way otherwise linked with the crime. A warrant should

have been applied for (*Ford & Kimble* v. *United States*, — App. D.C. —, 352, F. 2d 927, 933 [*en banc*]). In *Ford & Kimble*, the Court held that an arrest may be valid with a warrant where in a case that is close, it would not be without one.

In a case as dependent upon the testimony of one person as this, coupled with the denial of effective confrontation of an important witness, Goss, and denial of an evidentiary hearing where an issue of fact existed, it is submitted that Petitioner's application for a writ of certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

Constitutional and Statutory Provisions

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

AMENDMENT V:

. . . nor be deprived of life, liberty or property without due process or law . . ."

AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence.

RULE 41(e) F. R. Crim. P.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence . . .

Order on Rehearing

32161

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE A. RENO and HELEN WHARMBY,

Defendants,

DONALD DESIMONE,

Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant, Donald DeSimone,

Upon consideration thereof; it is

Ordered that said petition be and it hereby is denied.

The mandate of the Court is stayed subject to the provisions of Rule 28 of the Rules of the Court.

Bail pending application for certiorari is denied.

May 14, 1168

PAUL R. HAYS
ROBERT P. ANDERSON
WILFRED FEINBERG
Circuit Judges